No. 94-1989

(5)

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1994

LITTON SYSTEMS, INC.,

Petitioner,

v.

MARTHA CARROLL; JAMES CARROLL; ROSETTA EDWINA ROGERS; JAMES CARROLL, JR.; KEITH S. GENTLE; BELINDA GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; RANDY GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; FRED ALLEN CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; DEBBIE CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; BARBARA MESSER; ANCY SIMONDS, individually and as next friend and parent of Jennifer Simonds, a minor; JAMES GREEN; MARVIN GARRETT; KENNY GREEN; PEGGY GREEN; SANDRA HANCOCK, individually and as next friend and parent of Chuck Hancock, a minor; JAMES R. MESSER, individually and as next friend and parent of Jonathan Messer, a minor; MELANIE MESSER, individually and as next friend and parent of Jonathan Messer, a minor,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 LIST

The parent company of Litton Systems, Inc. is Litton Industries, Inc. There are no subsidiaries of Litton Systems, Inc. required to be disclosed under Supreme Court Rule 29.1.

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ARGUMENT

As set out in the petition, the Fourth Circuit panel, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), unanimously *affirmed* the lower court's exclusion of all of plaintiffs' expert testimony on exposure and specific medical causation.[1] However, by a 2-1 margin, the panel *reversed* the entry of summary judgment on respondents' personal injury claims, reasoning that a lay jury could properly infer exposure and specific medical causation even in the absence of admissible expert opinions on those issues. *See* Petition at 2. In so doing, the Fourth Circuit paid only lip service to *Daubert* and disregarded a long line of published Fourth Circuit cases establishing that expert testimony is a *sine qua non* for such complex tort claims. The issue thus presented for review by the petition is:

> May a federal district court, consistent with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), submit complex toxic tort claims to a jury in the absence of *any* admissible expert testimony on the questions of (a) exposure and (b) specific medical causation?

Petition at i.

In response, respondents have apparently attempted to cloud the issue posed by devoting much of their opposition to a detailed discussion of the evidentiary record below. The Court

[1] Contrary to the implications in respondents' brief, the district court excluded their expert testimony on specific medical causation for many reasons in addition to the experts' reliance upon the excluded testimony of Mr. Moore and Dr. Spencer. See, e.g., Conclusions of Law, ¶¶ D.15 (opinions not based on valid human data), D.19 (Dr. Broughton's opinions excluded under Fed. R. Evid. 403), D.23 (Dr. Feldman's opinions excluded because they were "purely speculative" and "contrary to the very principles and conditions he established . . . earlier"); App. at pp. 138a-40a, 141a. In affirming the district court's exclusion of these witnesses, the Fourth Circuit noted, but found it unnecessary to address, these additional bases for its conclusions. See App. at p. 11a n.5.

need not be distracted by this evidentiary detail, however, because two key admissions in respondents' opposition brief confirm that the issue stated in the petition is indeed clearly and cleanly presented by the Fourth Circuit's decision:

First, respondents concede that all of their experts on specific medical causation have been excluded. *See* Brief in Opposition at 6 ("the Appellate Court did rule the medical experts' opinions inadmissible . . ."); 12 ("**[t]he Fourth Circuit further ruled that Plaintiffs could not rely on the opinions of their three medical experts that the Plaintiffs' medical problems were caused by Litton's TCE**") (emphasis added). *Second*, respondents concede that their claims can therefore go to a jury only if the rule of law apparently applied by the Fourth Circuit majority is proper, *i.e.*, that "where exposure to hazardous substances is established . . ., a jury can reasonably infer that a plaintiffs' injuries were caused from that exposure" without need for expert medical testimony. Brief in Opposition at 16.[2] In light of these concessions, the pure legal issue raised by the petition can be resolved without immersion in the fact-bound record of this case.

The petition asks this Court to consider whether, as a matter of law, *Daubert* and other authorities prohibit complex toxic tort cases from going to the jury in the absence of scientifically reliable testimony on key elements of the plaintiffs' claims, *i.e.*, expert testimony demonstrating the elements of exposure and

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[2] Respondents cite several cases in support of this legal proposition. *See* Brief in Opposition at 16. In fact, those cases do not so hold. To the contrary, they generally address whether a plaintiff need employ expert testimony to establish product identification, not specific medical causation. *See, e.g., Roehling v. National Gypsum Co. Gold Bond Building Prods.*, 786 F.2d 1225, 1226 (4th Cir. 1986) (affirming summary judgment because plaintiff "could not identify the asbestos products to which he was exposed at . . . three job sites"). Of greater relevance are the Fourth Circuit's own prior decisions, cited in the Petition at 12, 17-18, which flatly reject the rule of law suggested by respondents.

specific medical causation. This is an important, but nonetheless rudimentary, issue that is crisply presented by the decision below and does not require extensive scrutiny of the factual record in this case. If as a matter of law in a complex toxic tort action a reasonable jury may not find for plaintiffs on the elements of exposure and specific medical causation in the absence of admissible expert testimony, as the prior decisions of the Fourth Circuit and numerous other courts hold, no amount of additional non-expert evidence can make up for that deficit.[3]

The Fourth Circuit has turned *Daubert* — which required that scientific evidence be *reliable* — into a license for a verdict in a highly technical case in the *absence* of reliable scientific evidence. The petition asks this Court to determine whether the "gatekeeping" process so carefully delineated in *Daubert* can thus become a meaningless exercise. The Fourth Circuit's ruling that a jury may speculate about scientific issues from which the gate has been barred to plaintiffs' expert witnesses is one that begs for review by this Court.

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[3] This court has long recognized that there are areas in which a lay jury cannot proceed unless assisted by expert testimony. In *Salem v. United States Lines*, 370 U.S. 31 (1962), the Court referred to those "causes of action in which the law predicates recovery upon expert testimony." *See id.* at 35 (citing 7 John H. Wigmore, Evidence in Trials at Common Law §§ 2090, 2090a (3d ed. 1940), and distinquishing cases for which expert testimony is necessary from those in which "men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation . . . "). Hydrogeologic contaminant transport and medical causation are areas that require expert testimony.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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